STATE OF MICHIGAN

COURT OF APPEALS

CLARA OATES,

Plaintiff-Appellant,

v

BERKLEY GMPS CO, LLC,

Defendant-Appellee.

UNPUBLISHED
July 19, 2005

No. 260842
Oakland Circuit Court
LC No. 2003-053899-NO

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a phlebotomist, was assigned to work at the office of a physician who leased space in a professional strip mall building owned by defendant. A sidewalk separated the building from a parking area. An overhang was constructed above the sidewalk. At approximately 6:00 p.m. on January 7, 2002, plaintiff was exiting the building when she slipped on black ice on the sidewalk and fell to the ground, sustaining injuries. She filed suit alleging that defendant negligently failed to maintain the premises in reasonably safe condition and to warn of the unsafe condition, and that the unsafe condition constituted a nuisance.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that it owed no duty to plaintiff because the condition was open and obvious, that no special aspects made the condition unreasonably dangerous in spite of its open and obvious nature, that it had no notice of the condition, and that the condition could not constitute a public nuisance because it was not continuing or permanent in nature. The trial court agreed and granted the motion pursuant to MCR 2.116(C)(10).

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Id*. The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The test is objective. A court must look to whether a reasonable person would have foreseen the danger, and not whether the particular plaintiff should have known that the condition was hazardous. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). If special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

As a general rule, and absent special circumstances, the hazards presented by ice and snow are open and obvious, and do not impose a duty on the property owner to warn of or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002). A property owner must take reasonable measures within a reasonable period after an accumulation of snow and ice to diminish the risk of injury to an invitee only if special aspects make the open and obvious condition unreasonably dangerous. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 106; 689 NW2d 737 (2004), quoting *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004).

A public nuisance is an unreasonable interference with a common right enjoyed by the general public, and includes conduct which: (1) significantly interferes with the public's health, safety, peace, comfort, or convenience; (2) is proscribed by law; or (3) was known or should have been known by the actor to be of a continuing nature which produces a permanent or long-lasting significant effect on the public's rights. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). A private citizen may pursue an action for a public nuisance if he can show that he suffered a type of harm different from that suffered by the general public. *Id*.

We affirm the trial court's order granting defendant's motion for summary disposition. Plaintiff's deposition revealed that she knew that snow had fallen at some point during the day. The fact that she claimed that she did not see the ice prior to the incident is irrelevant. *Joyce*, *supra*; *Novotney*, *supra* at 475. Plaintiff acknowledged that she did not look at the sidewalk as she exited the building, but that she clearly saw the ice after she fell to the ground. A reasonably prudent person would have been aware that weather conditions were such that ice could exist, and plaintiff would have observed the ice had she been paying attention to the sidewalk on which she walked as she exited the building. *Millikin v Walton Manor Mobile Home Park, Inc*, 234

Mich App 490, 497; 595 NW2d 152 (1999). The trial court correctly concluded that the danger presented by the ice was open and obvious. *Corey*, *supra* at 6.

Plaintiff's reliance on *Kenny*, *supra*, as support for her assertion that the condition was not open and obvious is misplaced. In that case, the elderly plaintiff arrived at the funeral home after dark, and slipped and fell on black ice covered by snow in the parking lot. The *Kenny* Court held that the trial court erred by granting the defendant's motion for summary disposition because, under the circumstances presented by the case, reasonable minds could differ "regarding the open and obvious nature of black ice under snow." *Id*. at 108. The *Kenny* Court emphasized that no evidence showed that previous rainfall or thawing might have put a reasonably prudent person on notice that ice could exist beneath the snow, and that several persons fell at approximately the same time as did the plaintiff. The *Kenny* Court concluded that a question of fact existed as to whether a reasonably prudent person would have recognized the danger presented by the snow-covered ice upon casual inspection. *Id*. at 108-109. Furthermore, the *Kenny* Court held that, even assuming that the condition was open and obvious, a question of fact existed regarding whether special aspects made the condition unreasonably dangerous because the parking space in which the plaintiff fell was the only one remaining when the vehicle in which she was a passenger arrived at the funeral home. *Id*. at 112-113.

Kenny, *supra*, is distinguishable from the instant case. In *Kenny*, *supra*, the black ice on which the plaintiff fell was concealed under a layer of snow. In this case, snow covered the parking area, but was not present on the sidewalk. Moreover, in this case, unlike in *Kenny*, *supra*, no evidence showed that any person other than plaintiff fell on the sidewalk.

Furthermore, we conclude that the trial court correctly found that plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. Plaintiff's decision to forego looking at the sidewalk on which she was walking was not a special aspect of the condition itself. Moreover, plaintiff testified that the physician's office had other exits. No evidence showed that plaintiff was precluded from using another exit. The condition was not so unreasonably dangerous that it created a risk of death or severe injury. Cf. *Lugo*, *supra* at 518; see also *Corey*, *supra* at 6-7) (falling several feet down ice-covered steps does not meet *Lugo* standard for unreasonable danger).

Finally, we hold that the trial court correctly granted summary disposition of plaintiff's claim of public nuisance. Plaintiff failed to show that she suffered harm different in kind than any other member of the public would suffer under similar circumstances. Furthermore, no evidence showed that the condition of which plaintiff complained was permanent or long-lasting, even during the winter months. *Cloverleaf Car Co*, *supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs